Filed 7/17/19 Adoption of A.S. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

Adoption of A.S., et al., Minors

A.M.,

Plaintiff and Respondent,

v.

A.G.,

Defendant and Appellant.

G055600

(Super. Ct. Nos. F005501, F005502, F005503)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Craig E. Arthur, Judge. Reversed and remanded.

Merritt L. McKeon for Plaintiff and Respondent.

Axelrod and Associates and Jennifer Axelrod for Defendant and Appellant.

A.G. is the maternal grandmother and adoptive mother of three minor children, a boy and two girls. A.M. is the paternal grandmother of the two girls and stepgrandmother of the boy. A.G. appeals from the trial court's order granting A.M.'s motion to enforce a visitation clause in the parties' postadoption contact agreement (agreement) entered into pursuant to Family Code section 8616.5. A.G. contends the agreement should be not be enforced and alleges the trial court committed prejudicial evidentiary error by overruling her objections to the Evidence Code section 730[1] expert's qualifications and report. Because we determine the court-appointed expert failed to demonstrate his qualifications, even after A.G.'s objections, we reverse the order. We remand the matter to the court for further proceedings consistent with this opinion.

FACTS[2]

A.G. and A.M. entered into an agreement, which provided A.M. with visitation of the three children on the first and third weekend of the month. After a while, A.G. asserted A.M. was not complying with the terms of the agreement and discussions failed to resolve the issues. A.G. unilaterally suspended A.M.'s visitation approximately one year after visits began. A.G. advised A.M. she was still welcome to contact the children through video messaging.

The parties went to mediation, but they did not reach an agreement to re-establish A.M.'s visitation. A.M. then filed the operative request to enforce, terminate, or modify the agreement, alleging A.G. breached its terms. A.G. filed her response, asking the court to terminate the agreement. A.G. also submitted a letter from the children's therapist, unattached to any motion or filing. The therapist recommended termination of

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[1] All further statutory references are to the Evidence Code, unless otherwise indicated.

[2] We note the underlying record in this case is designated confidential pursuant to Family Code section 9200. Due to the confidential nature of the background facts, we refer generally to the underlying adoption and use only facts included by the parties in their publically-filed briefs.

regular visitation with the exception of supervised video calls and proposed "therapeutically supervised contact."

Minors' counsel filed an "investigation and recommendations" report regarding the enforcement of the agreement, which recommended termination of the boy's visitation with A.M. and the resumption of visitations with the girls. The trial court appointed a section 730 expert, Dr. Gerardo Canul, to interview A.G., A.M., and the children. The expert opined there was no data to support termination of A.M.'s visitation. He also provided guidance as to when visitation should resume.

Shortly after the trial court appointed Canul, A.G. filed a letter brief with the court objecting to Canul's appointment and questioning his qualifications. The expert filed his report with the court on August 14, 2017, and the parties received it on August 28, 2017. A.G. filed objections to the report on September 1, 2017, which were originally due earlier, after the court granted leave to file by that date (presumably due to the fact that there was a two-week delay between when the report was filed and when it was received by the parties). The court overruled A.G.'s objections to the report as untimely. The same order stated "the court granted all counsel leave to file a response to Canul's report by Friday, September 1, 2017."

The trial court granted A.M.'s request to have the agreement enforced in part and denied it in part. The court determined termination of the agreement as to the boy was in his best interest. It concluded it was in the girls' best interests to enforce the agreement with certain modifications. The court ordered A.M. and the girls to initially resume contact in a therapeutic setting with the girls' therapist. In its ruling, the court noted A.G. "as the adoptive parent" did not have the right to "unilaterally cease all contact and visitations, or unilaterally change the terms of the agreement." However, the court also specified it did not "view the case as an issue of grandparent visitation," recognizing A.G.'s status as the children's adoptive mother, but rather whether the agreement should be enforced, modified, or terminated. The court stated it had

"attempted to fashion the modification with the goal of resuming the full intent of the agreement as to the girls, while at the same time allowing [A.G.]—their adoptive mother—the right to be able to parent the children as she deems fit and appropriate. The court gives great deference to [A.G.] as the children's parent."

DISCUSSION

A.G. argues the trial court erred by upholding the agreement because it violated A.G.'s due process rights by failing to apply the correct legal standard and improperly overruled A.G.'s objections to the court-appointed expert's report. We conclude the trial court did not apply an incorrect legal standard in determining whether the agreement was enforceable. Because we determine the court incorrectly overruled A.G.'s objections, we reverse and remand the matter.

I. Law Applicable to Postadoption Contact Agreements

"The basic purpose of . . . adoption is to promote the welfare, protection and betterment of the child by providing the security of a stable adoptive home . . . and to confer upon the [adoptive] parents discretion to provide for the best interests of the adopted child unfettered by interference from the former relatives. [Citations.]" (*In re Noreen G*. (2010) 181 Cal.App.4th 1359, 1391-1392 (*In re Noreen G*).) Family Code section 8616.5, subdivision (a), provides in relevant part: "The Legislature finds and declares that some adoptive children may benefit from either direct or indirect contact with birth relatives . . . . Postadoption contact agreements are intended to ensure children of an achievable level of continuing contact when contact is beneficial to the children and the agreements are voluntarily executed by birth relatives . . . ." (Fam. Code, § 8616.5, subd. (a).) Thus, "[a]greements that provide for birth [relatives] to continue visitation . . . following . . . adoption . . . must be found by the court to be in the best interests of the children. [Citations.]" (*In re Noreen G*., *supra*, 181 Cal.App.4th at p. 1394, fn. omitted.)

"A postadoption contact agreement may be modified or terminated only if either of the following occurs: [¶] (1) All parties, including the child if the child is 12

years of age or older at the time of the requested termination or modification, have signed a modified postadoption contact agreement and the agreement is filed with the court that granted the petition of adoption. [¶] (2) The court finds all of the following: [¶] (A) The termination or modification is necessary to serve the best interests of the child. [¶] (B) There has been a substantial change of circumstances since the original agreement was executed and approved by the court. [¶] (C) The party seeking the termination or modification has participated, or attempted to participate, in good faith in mediation or other appropriate dispute resolution proceedings prior to seeking court approval of the proposed termination or modification. [¶] Documentary evidence or offers of proof may serve as the basis for the court's decision. No testimony or evidentiary hearing shall be required. The court shall not order further investigation or evaluation by any public or private agency or individual absent a finding by clear and convincing evidence that the best interests of the child may be protected or advanced only by that inquiry and that the inquiry will not disturb the stability of the child's home to the detriment of the child." (Fam. Code, § 8616.5, subd. (h).)

Parents have a "fundamental right to make decisions concerning the care, custody, and control of [their] children. [Citation.]" (*In re Marriage of W.* (2003) 114 Cal.App.4th 68, 73.) "There is a presumption that fit parents act in the best interests of their children," and when a fit parent's decision is judicially challenged, the trial court must give the parent's decision "special weight." (*Troxel v. Granville* (2000) 530 U.S. 57, 68-70 (*Troxel*).)

II. Due Process Issues

A.G. contends the trial court's order enforcing the agreement as to the girls violated her due process rights as it ignored the liberty interest stated in *Troxel*. (*Troxel, supra*, 530 U.S. at pp. 68-70.) A.G. further argues the court improperly ignored the children's therapist's report. We find no error. We review a claim of legal error de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894.)

In *Troxel*, the grandparents of a deceased parent sued for grandparent visitation under section 26.10.160(3) of the Revised Code of Washington, which allowed "'any person'" to petition for visitation rights "'at any time"' provided such visitations "'serve[d] the best interest of the child."' (*Troxel*, *supra*, 530 U.S. at p. 60.) The United States Supreme Court upheld the Washington State Supreme Court's holding the statute was overbroad and improperly infringed on a parent's right to make decisions concerning the upbringing of their children. (*Id.* at pp. 68-69.) The *Troxel* court stated, "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family or to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. [Citation.]" (*Id.* at pp. 68-69.)

Unlike the situation in *Troxel*, here, the trial court explicitly declined to treat the case as one concerning grandparent visitation, but rather considered it solely as a postadoption contact agreement under Family Code section 8616.5. A.G. voluntarily entered into the agreement, which statutorily required changes by mutual written agreement or judicial decision. A.G. unilaterally terminated the agreement, failing to follow the statutory mechanism for doing so. The court did not inject itself into the parties' dispute, as suggested by A.G., but rather had jurisdiction over the matter as agreed to and understood by the parties when they signed the agreement. So while A.G. is the children's parent, and the court recognized her status as such, this did not give her the right to ignore her contractual obligations.

Additionally, assuming without deciding *Troxel* requires a trial court to give any decisions made by a fit parent, even those governed by postadoption contact agreements, "special weight," A.G. fails to demonstrate error. The court explicitly stated A.G., as the adoptive mother, had "the right to be able to parent her children as she deems fit and appropriate" and that "[t]he court gives great deference to her as the children's parent." It is clear the court understood A.G. was the children's parent, not just a

grandparent, and her decision-making was entitled to special weight. The court did not err in applying the legal standard concerning the enforcement of the agreement.

A.G. further contends the trial court ignored the children's therapist's report. To the contrary, the court specifically stated it had read and reviewed all documents filed by the parties, and made reference to the therapist's report in its ruling. Failing to precisely follow the therapist's recommendation was not the same as disregarding it. Additionally, the report was not attached to any motion or filing. The court had no obligation to consider the report. Even assuming the report should have been admitted and credited, there was no evidence the court ignored it.

Ultimately, the court applied the correct legal standard and did not violate A.G.'s due process rights or ignore the liberty interest stated in *Troxel*. While we find no legal error with enforcement of the agreement, as we discuss below, the order must still be reversed due to prejudicial evidentiary error.

III. Evidentiary Challenges to Court-Appointed Expert

A.G. argues the court improperly overruled her objections to the court-appointed expert's qualifications. We agree.

Pursuant to section 730, the trial court may appoint an expert to investigate and render a report where expert evidence is required by the court. "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." (§ 720, subd. (a).) Furthermore, nothing in section 730 "shall be construed to permit a person to perform any act for which a license is required unless the person holds the appropriate license to lawfully perform that act."

"In any contested proceeding involving child custody or visitation rights, the court may appoint a child custody evaluator to conduct a child custody evaluation in

cases where the court determines it is in the best interests of the child." (Fam. Code, § 3111.)[3] Because '"the results of an independent evaluation generally are given great weight by the judge in deciding contested custody . . . issues, the Judicial Council has adopted rules of court establishing uniform standards of practice for court-ordered custody evaluations.' [Citation.]" (*In re Marriage of Adams & Jack A.* (2012) 209 Cal.App.4th 1543, 1563.)

Pursuant to California Rules of Court, rule 5.225, Evidence Code section 730 custody evaluators have specific licensing requirements (California Rules of Court, rule 5.225(c)); education and training requirements (California Rules of Court, rule 5.225(d)); additional training requirements (California Rules of Court, rule 5.225(e)); experience requirements (California Rules of Court, rule 5.225(g)); and continuing education and training requirements (California Rules of Court, rule 5.225(i)). Additionally, under California Rules of Court, rule 5.225(l): "A person appointed as a child custody evaluator must: [¶] (1) Submit to the court a declaration indicating compliance with all applicable education, training, and experience requirements: [¶] . . . [¶] (B) Private child custody evaluators must complete a *Declaration of Private Child Custody Evaluator Regarding Qualifications* (form FL-326) and file it with the clerk's office no later than 10 days after notification of each appointment and before any work on each child custody evaluation has begun."

We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.) "[T]o challenge a witness on the ground of inadequate qualifications, the opponent of the testimony must

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[3] We assume the enforcement of the agreement concerning visitation of the children falls under the broad language of Family Code section 3111, and applies to court-appointed experts in this scenario. However, even if Canul was not subject to the requirements of a child custody evaluator, pursuant to section 720, A.G.'s objection to his qualifications still triggered a showing of his "special knowledge, skill, experience, training, or education." (§ 720, subd. (a).)

lodge an objection, and the trial court determines the witness's competency as a preliminary fact. [Citations.]" (*In re Joy M*. (2002) 99 Cal.App.4th 11, 19.) "Claims of evidentiary error under California law are reviewed for prejudice applying the 'miscarriage of justice' or 'reasonably probable' harmless error standard . . . . " (*Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 447.)

The trial court appointed Canul as a section 730 expert to interview A.G., A.M., and the children. Neither the court, nor Canul, provided any information he met any of the myriad of requirements discussed above. Shortly after Canul's appointment, before his report was filed, A.G. filed a letter brief with the court objecting to Canul's appointment and questioning his qualifications. A.G. expressed concern by stating, "there is no indication where the name of [Canul] was obtained. In Orange County Family Court there is a list of approved experts that is available online and . . . Canul is not on that list. Using an expert on the court's approval list, provides [c]ounsel and the parties with confidence that the particular expert has the necessary training, skills, and expertise, as well as the necessary background [to] determine the issues of the court feels it needs assistance with. At this point, an Internet service has found that Canul has been licensed for approximately 12 years, perhaps has a private practice, and teaches psychology and Latino psychology at UCI. There is no available information that he has any experience with children, child psychology, child trauma, or anything else that would make him an appropriate expert in this situation." The court did not respond to A.G.'s objections to Canul's appointment and qualifications. After Canul filed his expert report, A.G. filed objections to both Canul's qualifications and the substance of his report. In its order, the court overruled as untimely A.G.'s objections to the court's appointment of Canul as an expert.

Dr. Canul's qualifications have not been shown. His report is also devoid of any mention of his education, experience, or training. Tellingly, A.M. did not respond

to A.G.'s argument Canul failed to provide qualifications as required by law and after an objection by A.G.

On these facts, and given the delicate task of assessing the best interests of the minor children, the court abused its discretion in overruling A.G.'s objections to Canul's appointment. Before the court could rely on Canul's expert report, Canul needed to demonstrate his qualifications. A.G. objected twice to Canul's qualifications, both before and after his report. These objections should have been addressed by the court. Furthermore, to the extent the court's ruling classifying A.G.'s objections to Canul's qualifications and report as untimely was based upon the initial schedule to respond to the report, the record is clear the court granted the parties additional time to respond. Because the court relied on Canul's report as a basis for its ruling without ensuring he was properly qualified to render expert advice, the evidentiary error was not harmless. The matter is remanded for further proceedings.

DISPOSITION

The order is reversed and remanded for a new hearing as to the qualifications of the court-appointed expert and enforcement of the agreement. On remand, the trial court shall determine whether Canul is qualified as a court-appointed expert pursuant to section 730, consider any new events that have transpired while this matter was decided on appeal, and determine whether the agreement remains enforceable.

O'LEARY, P. J.

I CONCUR:

BEDSWORTH, J.

ARONSON, J., Dissenting.

The majority correctly concludes the trial court did not err in rejecting A.G.'s claims she had the right to unilaterally alter the terms of her postadoption agreement with A.M. by ending A.M.'s visits with her granddaughters. In a carefully crafted order, the court ordered A.M.'s visitation to resume under the supervision of the children's therapist, whom A.G. had retained. Nevertheless, the majority finds prejudicial error because the court did not rule on A.G.'s objections to the qualifications of the court's appointed expert. True, the court should have ruled on A.G.'s objections, but I cannot agree this resulted in any prejudice to A.G. After all, the expert was a clinical psychologist and surely his training and special knowledge qualified him as an expert. In any event, the record shows the court placed more weight on the recommendations of the children's therapist and the children's counsel. A.M. has not seen her granddaughters in two years. If anyone has suffered prejudice, it is A.M.

"[A] trial court judgment is ordinarily presumed to be correct and the burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error that justifies reversal of the judgment." (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609.) A.G. did not meet that burden.

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) "When a preliminary showing is made that the proposed witness has sufficient knowledge to qualify as an expert under the Evidence Code, questions about the depth or scope of his or her knowledge or experience go to the weight, not the admissibility, of the witness's testimony." (*People v. Jones* (2013) 57 Cal.4th 899, 949-950.) The test is whether it is likely the witness has sufficient knowledge, skill or experience to assist the fact finder.

(Wegner et al, Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2016) ¶ 8:733, p. 8C-129.)

Here, the expert's report disclosed that he has a Ph.D., is a licensed psychologist, and practices in the field of clinical psychology. This alone shows the expert was qualified to opine on whether terminating A.M.'s visitation rights was in the children's best interest, whether visitation should resume, and if so, the parameters under which it should resume. Any questions about the scope of his experience should have gone to the weight, not to the admissibility, of his report.[4]

Even if the expert was not qualified, however, the admission of his report was harmless. His report contained only four opinions: (1) no psychological data supported terminating A.M.'s visitation of the children; (2) A.M. should receive supportive counseling before resuming contact with A.G. and the children; (3) "a clinician [should] be consulted and/or utilized to provide therapeutic facilitation once visits resume in order to increase the level of comfort and building of trust between" A.M. and A.G.; and (4) that clinician should make a recommendation on whether any of the children need a different visitation pattern.

Importantly, the expert's opinions did not materially contradict the recommendations of the children's therapist, whom A.G. retained, or the recommendations of the minors' counsel. The children's therapist recommended all

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[4] The majority notes there was no evidence the expert met the requirements of California Rules of Court, rule 5.225, which sets forth various licensing, education, training, and experience requirements for child custody evaluators whom a court appoints to conduct child custody evaluations under Evidence Code section 730. (Opn., at pp. 8- 9.) I am not convinced those requirements apply here. Although the trial court appointed the expert under section 730, it expressly noted it did "not view this case as an issue of grandparent visitation" or custody; instead, this case was about the enforceability of a postadoption contract agreement dictating the terms of the adopted children's contact with a birth relative. (See Fam. Code, § 8616.5; Cal. Rules Ct., rule 5.451.)

contact between the children and A.M. should be "controlled" and "therapeutically supervised" until A.M. demonstrates she accepts and will reinforce A.G.'s parenting plan and schedule. The minors' counsel similarly recommended the girls' visitation with A.M. commence in a therapeutic setting to establish boundaries with A.M., and further recommended the boy have no contact with A.M. The minors' counsel's recommendations were supported by a detailed declaration from an investigator who had interviewed A.M., A.G., the children, and their therapist.

Consistent with these various recommendations, the trial court ordered: A.M. could no longer visit the boy; before visiting with the girls, A.M. must first meet with the girls' therapist and A.G., without the girls present, so A.M. and A.G. could establish an understanding of their respective obligations and reconfirm their willingness to comply with the agreement; A.M.'s initial contact with the girls must "occur in a therapeutic setting with" the girls' therapist; and after initial therapeutic sessions with A.M. and the girls, contact and visitation would gradually increase, ultimately building up to the regular weekend visitation contemplated under the contract.[5] Because the court's ruling largely followed the various recommendations of the children's therapist, and the minors' counsel, I do not see how the admission of the expert's bare bones report materially influenced the court's ultimate ruling. The court did not state in its ruling that the expert's report guided its decision at all; in contrast, it described the declaration of the minor's counsel's investigator as "honest" and "unbiased."

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[5] The trial court's ruling also required A.M. to take the children to all events scheduled on her weekends without question, to call the children by their adoptive names without exception, to keep A.G. apprised of their weekend plans, and to comply with the girls' dietary regimens; it prohibited any contact with the girls' biological father (as recommended by the minors' counsel and the children's therapist); and it prohibited A.M. from encouraging the girls to keep any secrets from A.G. (as recommended by the children's therapist). The expert did not offer an opinion on any of those issues.

"'[T]he erroneous admission of expert testimony only warrants reversal if "it is *reasonably probable* that a result more favorable to the appealing party would have been reached in the absence of the error."'" (*People v. Pearson* (2013) 56 Cal.4th 393, 446, italics added; see *Burton v. Sanner* (2012) 207 Cal.App.4th 12, 22.) A.G. fell far short of showing a reasonable probability she would have obtained a more favorable result (i.e., complete termination of visitation) if the trial court had excluded the expert's report. Indeed, this record shows the court gave scant weight to the appointed expert's report. There simply is no indication the expert's report is what convinced the court not to terminate A.M.'s visitation rights as to the girls. Indeed, neither the children's therapist nor the minors' counsel recommended terminating A.M.'s visits with the girls altogether, so even if the expert's report had been excluded, it seems improbable the court would have decided to completely terminate visitation with A.M. A.G. produced no evidence to show it was in the children's best interest to terminate A.M.'s visitation rights.

By reversing and remanding this matter, the majority, in my view, unnecessarily delays A.M.'s ability to resume visitation with the two girls. I would affirm the trial court's ruling.

ARONSON, J.